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94TH CONGRESS } SENATE { REPORT
2d Session } { No. 94-755

INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS

BOOK II

FINAL REPORT

OF THE

SELECT COMMITTEE
TO STUDY GOVERNMENTAL OPERATIONS

WITH RESPECT TO

INTELLIGENCE ACTIVITIES
UNITED STATES SENATE

TOGETHER WITH

ADDITIONAL, SUPPLEMENTAL, AND SEPARATE VIEWS

APRIL 26 (legislative day, APRIL 14), 1976

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don his supposed 'obedience' to white liberal doctrines (non-violence)."[70] In short, a non-violent man was to be secretly attacked and destroyed as insurance against his abandoning non-violence.

(b) *Illegal or Improper Means.*—The surveillance which we investigated was not only vastly excessive in breadth and a basis for degrading counterintelligence actions, but was also often conducted by illegal or improper means. For example:

(1) For approximately 20 years the CIA carried out a program of indiscriminately opening citizens' first class mail. The Bureau also had a mail opening program, but cancelled it in 1966. The Bureau continued, however, to receive the illegal fruits of CIA's program. In 1970, the heads of both agencies signed a document for President Nixon, which correctly stated that mail opening was illegal, falsely stated that it had been discontinued, and proposed that the illegal opening of mail should be resumed because it would provide useful results. The President approved the program, but withdrew his approval five days later. The illegal opening continued nonetheless. Throughout this period CIA officials knew that mail opening was illegal, but expressed concern about the "flap potential" of exposure, not about the illegality of their activity.[71]

(2) From 1947 until May 1975, NSA received from international cable companies millions of cables which had been sent by American citizens in the reasonable expectation that they would be kept private.[72]

(3) Since the early 1930's, intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of judicial warrant. Recent court decisions have curtailed the use of these techniques against domestic targets. But past subjects of these surveillances have included a United States Congressman, a Congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam War protest group. While the prior written approval of the Attorney General has been required for all warrantless wiretaps since 1940, the record is replete with instances where this requirement was ignored and the Attorney General gave only after-the-fact authorization.

Until 1965, microphone surveillance by intelligence agencies was wholly unregulated in certain classes of cases. Within weeks after a 1954 Supreme Court decision denouncing the FBI's installation of a microphone in a defendant's bedroom, the Attorney General informed the Bureau that he did not believe the decision applied to national security cases and

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[70] Memorandum from FBI Headquarters to all SACs, 3/4/68.

[71] See Mail Opening Report: Section II, "Legal Considerations and the 'Flap' Potential."

[72] See NSA Report: Section I, "Introduction and Summary."

II. THE GROWTH OF DOMESTIC INTELLIGENCE: 1936 TO 1976

A. Summary

1. The Lesson: History Repeats Itself

During and after the First World War, intelligence agencies, including the predecessor of the FBI, engaged in repressive activity.[1] A new Attorney General, Harlan Fiske Stone, sought to stop the investigation of "political or other opinions."[2] This restraint was embodied only in an executive pronouncement, however. No statutes were passed to prevent the kind of improper activity which had been exposed. Thereafter, as this narrative will show, the abuses returned in a new form. It is now the responsibility of all three branches of government to ensure that the pattern of abuse of domestic intelligence activity does not recur.

2. The Pattern: Broadening Through Time

Since the re-establishment of federal domestic intelligence programs in 1936, there has been a steady increase in the government's capability and willingness to pry into, and even disrupt, the political activities and personal lives of the people. The last forty years have witnessed a relentless expansion of domestic intelligence activity beyond investigation of criminal conduct toward the collection of political intelligence and the launching of secret offensive actions against Americans.

The initial incursions into the realm of ideas and associations were related to concerns about the influence of foreign totalitarian powers.

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[1] Repressive practices during World War I included the formation of a volunteer auxiliary force, known as the American Protective League, which assisted the Justice Department and military intelligence in the investigation of "un-American activities" and in the mass round-up of 50,000 persons to discover draft evaders. These so-called "slacker raids" of 1918 involved warrantless arrests without sufficient probable cause to believe that crime had been or was about to be committed (FBI Intelligence Division memorandum, "An Analysis of FBI Domestic Security Intelligence Investigations," 10/28/75.)

The American Protective League also contributed to the pressures which resulted in nearly 2,000 prosecutions for disloyal utterances and activities during World War I, a policy described by John Lord O'Brien, Attorney General Gregory's Special Assistant, as one of "wholesale repression and restraint of public opinion." (Zechariah Chafee, *Free Speech in the United States* (Cambridge: Harvard University Press, 1941) p. 69.)

Shortly after the war the Justice Department and the Bureau of Investigation jointly planned the notorious "Palmer Raids", named for Attorney General A. Mitchell Palmer who ordered the overnight round-up and detention of some 10,000 persons who were thought to be "anarchist" or "revolutionary" aliens subject to deportation. (William Preston, *Aliens and Dissenters* (Cambridge: Harvard University Press, 1963), chs. 7–8; Stanley Coben, *A. Mitchell Palmer: Politician* (New York: Columbia University Press, 1963), chs. 11–12.)

[2] See Attorney General Stone's full statement, p. 23.

Ultimately, however, intelligence activity was directed against domestic groups advocating change in America, particularly those who most vigorously opposed the Vietnam war or sought to improve the conditions of racial minorities. Similarly, the targets of intelligence investigations were broadened from groups perceived to be violence prone to include groups of ordinary protesters.

3. Three Periods of Growth for Domestic Intelligence

The expansion of domestic intelligence activity can usefully be divided into three broad periods: (a) the pre-war and World War II period; (b) the Cold War era; and (c) the period of domestic dissent beginning in the mid-sixties. The main developments in each of these stages in the evolution of domestic intelligence may be summarized as follows:

a. 1936–1945

By presidential directive—rather than statute—the FBI and military intelligence agencies were authorized to conduct domestic intelligence investigations. These investigations included a vaguely defined mission to collect intelligence about "subversive activities" which were sometimes unrelated to law enforcement. Wartime exigencies encouraged the unregulated use of intrusive intelligence techniques; and the FBI began to resist supervision by the Attorney General.

b. 1946–1963

Cold War fears and dangers nurtured the domestic intelligence programs of the FBI and military, and they became permanent features of government. Congress deferred to the executive branch in the oversight of these programs. The FBI became increasingly isolated from effective outside control, even from the Attorneys General. The scope of investigations of "subversion" widened greatly. Under the cloak of secrecy, the FBI instituted its COINTELPRO operations to "disrupt" and "neutralize" "subversives". The National Security Agency, the FBI, and the CIA re-instituted instrusive wartime surveillance techniques in contravention of law.

c. 1964–1976

Intelligence techniques which previously had been concentrated upon foreign threats and domestic groups said to be under Communist influence were applied with increasing intensity to a wide range of domestic activity by American citizens. These techniques were utilized against peaceful civil rights and antiwar protest activity, and thereafter in reaction to civil unrest, often without regard for the consequences to American liberties. The intelligence agencies of the United States—sometimes abetted by public opinion and often in response to pressure from administration officials or the Congress—frequently disregarded the law in their conduct of massive surveillance and aggressive counterintelligence operations against American citizens. In the past few years, some of these activities were curtailed, partly in response to the moderation of the domestic crisis; but all too often improper programs were terminated only in response to exposure, the *threat* of exposure, or a change in the climate of public opinion, such as that triggered by the Watergate affair.

Upon receipt of this order, the FBI Director did not in fact abolish its list. The FBI continued to maintain an index of persons "who may be dangerous or potentially dangerous to the public safety or internal security of the United States." In response to the Attorney General's order, the FBI merely changed the name of the list from Custodial Detention List to Security Index. Instructions to the field stated that the Security Index should be kept "strictly confidential," and that it should never be mentioned in FBI reports or "discussed with agencies or individuals outside the Bureau" except for military intelligence agencies.[67]

This incident provides an example of the FBI's ability to conduct domestic intelligence operations in opposition to the policies of an Attorney General. Despite Attorney General Biddle's order, the "dangerousness" list continued to be kept, and investigations in support of that list continued to be a significant part of the Bureau's work.

7. Intrusive Techniques: Questionable Authorization

a. Wiretaps: A Strained Statutory Interpretation

In 1940, President Roosevelt authorized FBI wiretapping against "persons suspected of subversive activities against the United States, including suspected spies," requiring the specific approval of the Attorney General for each tap and directing that they be limited "insofar as possible to aliens." [68]

This order was issued in the face of the Federal Communications Act of 1934, which had prohibited wiretapping.[69] However, the Attorney General interpreted the Act of 1934 so as to permit government wiretapping. Since the Act made it unlawful to "intercept *and* divulge" communications, Attorney General Jackson contended that it did not apply if there was no divulgence *outside* the Government. [Emphasis added.] [70] Attorney General Jackson's questionable interpretation was accepted by succeeding Attorneys General (until 1968) but never by the courts.[71]

Jackson informed the Congress of his interpretation. Congress considered enacting an exception to the 1934 Act, and held hearings in which Director Hoover said wiretapping was "of considerable importance" because of the "gravity" to "national safety" of such of-for the subsequent adoption of the Fourth Amendment in 1791,[107] and this technique is certainly no less intrusive today.

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[67] Memorandum from J. Edgar Hoover to FBI Field Offices, Re: Dangerousness Classification, 8/14/43. This is the only document pertaining to Director Hoover's decision which appears in the material provided by the FBI to the Select Committee covering Bureau policies for the "Security Index." The FBI interpreted the Attorney General's order as applying only to "the dangerous classifications previously made by the . . . Special War Policies Unit" of the Justice Department. (The full text of the Attorney General's order and the FBI directive appear in Hearings, Vol. 6, pp. 412–415.)

[68] Confidential memorandum from President Roosevelt to Attorney General Jackson, 5/21/40.

[69] 47 U.S.C. 605. The Supreme Court held that this Act made wiretap-obtained evidence or the fruits thereof inadmissible in federal criminal cases. *Nardone* v. *United States*, 302 U.S. 379 (1937); 308 U.S. 338 (1939).

[70] Letter from Attorney General Jackson to Rep. Hatton Summers, 3/19/41.

[71] E.g., *United States* v. *Butenko*, 494 F.2d 593 (3d Cir. 1974), *cert. denied* sub nom. *Ivanov* v. *United States*, 419 U.S. 881 (1974). The Court of Appeals held in this case that warrantless wiretapping could only be justified on a theory of inherent Presidential power, and questioned the statutory interpretation relied upon since Attorney General Jackson's time. Until 1967, the Supreme Court did not rule that wiretapping violated the Fourth Amendment. [*Olmstead* v. *United States*, 275 U.S. 557 (1927); *Katz* v. *United States*, 389 U.S. 347 (1967).]

Subfunding (c)

The imprecision and manipulation of labels such as "national security," "domestic security," "subversive activities" and "foreign intelligence" have led to unjustified use of these techniques.

Using labels such as "national security" and "foreign intelligence", intelligence agencies have directed these highly intrusive techniques against individuals and organizations who were suspected of no criminal activity and who posed no genuine threat to the national security. In the absence of precise standards and effective outside control, the selection of American citizens as targets has at times been predicated on grounds no more substantial than their lawful protests or their non-conformist philosophies. Almost any connection with any perceived danger to the country has sufficed.

The application of the "national security" rationale to cases lacking a substantial national security basis has been most apparent in the area of warrantless electronic surveillance. Indeed, the unjustified use of wiretaps and bugs under this and related labels has a long history. Among the wiretaps approved by Attorney General Francis Biddle under the standard of "persons suspected of subversive activities," for example, was one on the Los Angeles Chamber of Commerce in 1941.[108] This was approved in spite of his comment to J. Edgar Hoover that the target organization had "no record of espionage at this time." [109] In 1945, Attorney General Tom Clark authorized a wiretap on a former aide to President Roosevelt.[110] According to a memorandum by J. Edgar Hoover, Clark stated that President Truman wanted "a very thorough investigation" of the activities of the former official so that "steps might be taken, if possible, to see that [his] activities did not interfere with the proper administration of government." [111] The memorandum makes no reference to "subversive activities" or any other national security considerations.

The "Sugar Lobby" and Martin Luther King, Jr., wiretaps in the early 1960s both show the elasticity of the "domestic security" standard which supplemented President Roosevelt's "subversive activities" formulation. Among those wiretapped in the Sugar Lobby investigation, as noted above, was a Congressional staff aide. Yet the documentary record of this investigation reveals no evidence indicating that the target herself represented any threat to the "domestic security." Similarly, while the FBI may properly have been concerned with the activities of certain advisors to Dr. King, the direct wiretapping of Dr. King shows that the "domestic security" standard could be stretched to unjustified lengths.

The microphone surveillances of Congressman Cooley and Dr. King under the "national interest" standard established by Attorney General Brownell in 1954 also reveal the relative ease with which electronic bugging devices could be used against American citizens who cerning domestic revenue sharing and welfare reform.[122] The reinstatement of another wiretap in this series was requested by H. R. Haldeman simply because "they may have a bad apple and have to get him out of the basket." [123] The last four requests in this series that were sent to the Attorney General (including the requests for a tap on the "bad apple") did not mention any national security justification at all. As former Deputy Attorney General William Ruckelshaus has testified:

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[107] See, e.g., *Olmstead* v. *United States*, 277 U.S. 438, (1928).

[108] Memorandum from Francis Biddle to Mr. Hoover, 11/19/41.

[109] Ibid.

[110] Unaddressed Memorandum from J. Edgar Hoover, 11/15/45, found in Director Hoover's "Official and Confidential" files.

[111] Ibid.

> I think some of the individuals who were tapped, at least to the extent I have reviewed the record, had very little, if any, relationship to any claim of national security . . . I think that as the program proceeded and it became clear to those who could sign off on taps how easy it was to institute a wiretap under the present procedure that these kinds of considerations [i.e., genuine national security justifications] were considerably relaxed as the program went on.[124]

None of the "seventeen" wiretaps was ever reauthorized by the Attorney General, although 10 of them remained in operation for periods longer than 90 days and although President Nixon himself stated privately that "[t]he tapping was a very, very unproductive thing . . . it's never been useful to any operation I've conducted . . ." [125]

In short, warrantless electronic surveillance has been defended on the ground that it was essential for the national security, but the history of the use of this technique clearly shows that the imprecision and manipulation of this and similar labels, coupled with the absence of any outside scrutiny, has led to its improper use against American citizens who posed no criminal or national security threat to the country.[126]

Similarly, the terms "foreign intelligence" and "counterespionage" were used by the CIA and the FBI to justify their cooperation in the CIA's New York mail opening project, but this project was also used to target entirely innocent American citizens.

As noted above, the CIA compiled a "Watch List" of names of persons and organizations whose mail was to be opened if it passed through the New York facility. In the early days of the project, the names on this list—which then numbered fewer than twenty—might reason-

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[122] Memorandum from W. C. Sullivan to C. D. DeLoach, 8/1/69.

[123] Memorandum from J. Edgar Hoover to Messrs. Tolson, Sullivan and D. C. Brennan, 10/15/70.

[124] Ruckelshaus testimony before the Senate Subcommittee on Administrative Practice and Procedure, 5/9/74, pp. 311–12.

[125] Transcript of the Presidential Tapes, 2/28/73 (House Judiciary Committee Statement of Information Book VII, Part W, p. 1754.)

[126] The term "national security" was also used by John Ehrlichman and Charles Colson to justify their roles in the break-in of Dr. Fielding's office in 1971. A March 21, 1973 tape recording of a meeting between President Nixon, John Dean, and H. R. Haldeman suggests, however, that the national security "justification" may have been developed long after the event for the purpose of obscuring its impropriety. When the President asked what could be done if the break-in was revealed publicly, John Dean suggested, "You might put it on a national security grounds basis." Later in the conversation, President Nixon stated "With the bombing thing coming out and everything coming out, the whole thing was national security," and Dean said, "I think we could get by on that." (Transcript of Presidential tapes, 3/21/73.)

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

The findings which have emerged from our investigation convince us that the Government's domestic intelligence policies and practices require fundamental reform. We have attempted to set out the basic facts; now it is time for Congress to turn its attention to legislating restraints upon intelligence activities which may endanger the constitutional rights of Americans.

The Committee's fundamental conclusion is that intelligence activities have undermined the constitutional rights of citizens and that they have done so primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied.

Before examining that conclusion, we make the following observations.

—While nearly all of our findings focus on excesses and things that went wrong, we do not question the need for lawful domestic intelligence. We recognize that certain intelligence activities serve perfectly proper and clearly necessary ends of government. Surely, catching spies and stopping crime, including acts of terrorism, is essential to insure "domestic tranquility" and to "provide for the common defense." Therefore, the power of government to conduct *proper* domestic intelligence activities under effective restraints and controls must be preserved.

—We are aware that the few earlier efforts to limit domestic intelligence activities have proven ineffectual. This pattern reinforces the need for statutory restraints coupled with much more effective oversight from all branches of the Government.

—The crescendo of improper intelligence activity in the latter part of the 1960s and the early 1970s shows what we must watch out for: In time of crisis, the Government will exercise its power to conduct domestic intelligence activities to the fullest extent. The distinction between legal dissent and criminal conduct is easily forgotten. Our job is to recommend means to help ensure that the distinction will always be observed.

—In an era where the technological capability of Government relentlessly increases, we must be wary about the drift toward "big brother government." The potential for abuse is awesome and requires special attention to fashioning restraints which not only cure past problems but anticipate and prevent the future misuse of technology.

—We cannot dismiss what we have found as isolated acts which were limited in time and confined to a few willful men. The failures to obey the law and, in the words of the oath of office, to "preserve, protect, and defend" the Constitution, have occurred repeatedly throughout administrations of both political parties going back four decades.

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—We must acknowledge that the assignment which the Government has given to the intelligence community has, in many ways, been impossible to fulfill. It has been expected to predict or prevent every crisis, respond immediately with information on any question, act to meet all threats, and anticipate the special needs of Presidents. And then it is chastised for its zeal. Certainly, a fair assessment must place a major part of the blame upon the failures of senior executive officials and Congress.

In the final analysis, however, the purpose of this Committee's work is not to allocate blame among individuals. Indeed, to focus on personal culpability may divert attention from the underlying institutional causes and thus may become an excuse for inaction.

Before this investigation, domestic intelligence had never been systematically surveyed. For the first time, the Government's domestic surveillance programs, as they have developed over the past forty years, can be measured against the values which our Constitution seeks to preserve and protect. Based upon our full record, and the findings which we have set forth in Part III above, the Committee concludes that:

Domestic Intelligence Activity Has Threatened and Undermined The Constitutional Rights of Americans to Free Speech, Association and Privacy. It Has Done So Primarily Because The Constitutional System for Checking Abuse of Power Has Not Been Applied.

Our findings and the detailed reports which supplement this volume set forth a massive record of intelligence abuses over the years. Through a vast network of informants, and through the uncontrolled or illegal use of intrusive techniques—ranging from simple theft to sophisticated electronic surveillance—the Government has collected, and then used improperly, huge amounts of information about the private lives, political beliefs and associations of numerous Americans.

Affect Upon Constitutional Rights.—That these abuses have adversely affected the constitutional rights of particular Americans is beyond question. But we believe the harm extends far beyond the citizens directly affected.

Personal privacy is protected because it is essential to liberty and the pursuit of happiness. Our Constitution checks the power of Government for the purpose of protecting the rights of individuals, in order that all our citizens may live in a free and decent society. Unlike totalitarian states, we do not believe that any government has a monopoly on truth.

When Government infringes those rights instead of nurturing and protecting them, the injury spreads far beyond the particular citizens targeted to untold numbers of other Americans who may be intimidated.

Free government depends upon the ability of all its citizens to speak their minds without fear of official sanction. The ability of ordinary people to be heard by their leaders means that they must be free to join in groups in order more effectively to express their grievances. Constitutional safeguards are needed to protect the timid as well as the courageous, the weak as well as the strong. While many Americans have been willing to assert their beliefs in the face of possible governmental reprisals, no citizen should have to weigh his or her desire to express an opinion, or join a group, against the risk of having lawful speech or association used against him.

Persons most intimidated may well not be those at the extremes of the political spectrum, but rather those nearer the middle. Yet voices of moderation are vital to balance public debate and avoid polarization of our society.

The federal government has recently been looked to for answers to nearly every problem. The result has been a vast centralization of power. Such power can be turned against the rights of the people. Many of the restraints imposed by the Constitution were designed to guard against such use of power by the government.

Since the end of World War II, governmental power has been increasingly exercised through a proliferation of federal intelligence programs. The very size of this intelligence system, multiplies the opportunities for misuse.

Exposure of the excesses of this huge structure has been necessary. Americans are now aware of the capability and proven willingness of their Government to collect intelligence about their lawful activities and associations. What some suspected and others feared has turned out to be largely true—vigorous expression of unpopular views, association with dissenting groups, participation in peaceful protest activities, have provoked both government surveillance and retaliation.

Over twenty years ago, Supreme Court Justice Robert Jackson, previously an Attorney General, warned against growth of a centralized power of investigation. Without clear limits, a federal investigative agency would "have enough on enough people" so that "even if it does not elect to prosecute them" the Government would, he wrote, still "find no opposition to its policies". Jackson added, "Even those who are supposed to supervise [intelligence agencies] are likely to fear [them]." His advice speaks directly to our responsibilities today:

> I believe that the safeguard of our liberty lies in limiting any national police or investigative organization, first of all to a small number of strictly federal offenses, and secondly to nonpolitical ones. The fact that we may have confidence in the administration of a federal investigative agency under its existing head does not mean that it may not revert again to the days when the Department of Justice was headed by men to whom the investigative power was a weapon to be used for their own purposes.[1]

Failure to Apply Checks and Balances.—The natural tendency of Government is toward abuse of power. Men entrusted with power, even those aware of its dangers, tend, particularly when pressured, to slight liberty.

Our constitutional system guards against this tendency. It establishes many different checks upon power. It is those wise restraints which keep men free. In the field of intelligence those restraints have too often been ignored.

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[1] Robert H. Jackson, *The Supreme Court in the American System of Government* (New York: Harper Torchbook, 1955, 1963), pp. 70–71.

The three main departures in the intelligence field from the constitutional plan for controlling abuse of power have been:

(*a*) *Excessive Executive Power.*—In a sense the growth of domestic intelligence activities mirrored the growth of presidential power generally. But more than any other activity, more even than exercise of the war power, intelligence activities have been left to the control of the Executive.

For decades Congress and the courts as well as the press and the public have accepted the notion that the control of intelligence activities was the exclusive prerogative of the Chief Executive and his surrogates. The exercise of this power was not questioned or even inquired into by outsiders. Indeed, at times the power was seen as flowing not from the law, but as inherent in the Presidency. Whatever the theory, the fact was that intelligence activities were essentially exempted from the normal system of checks and balances.

Such Executive power, not founded in law or checked by Congress or the courts, contained the seeds of abuse and its growth was to be expected.

(*b*) *Excessive Secrecy.*—Abuse thrives on secrecy. Obviously, public disclosure of matters such as the names of intelligence agents or the technological details of collection methods is inappropriate. But in the field of intelligence, secrecy has been extended to inhibit review of the basic programs and practices themselves.

Those within the Executive branch and the Congress who would exercise their responsibilities wisely must be fully informed. The American public, as well, should know enough about intelligence activities to be able to apply its good sense to the underlying issues of policy and morality.

Knowledge is the key to control. Secrecy should no longer be allowed to shield the existence of constitutional, legal and moral problems from the scrutiny of all three branches of government or from the American people themselves.

(*c*) *Avoidance of the Rule of Law.*—Lawlessness by Government breeds corrosive cynicism among the people and erodes the trust upon which government depends.

Here, there is no sovereign who stands above the law. Each of us, from presidents to the most disadvantaged citizen, must obey the law.

As intelligence operations developed, however, rationalizations were fashioned to immunize them from the restraints of the Bill of Rights and the specific prohibitions of the criminal code. The experience of our investigation leads us to conclude that such rationalizations are a dangerous delusion.

B. Principles Applied in Framing Recommendations and The Scope of the Recommendations.

Although our recommendations are numerous and detailed, they flow naturally from our basic conclusion. Excessive intelligence activity which undermines individual rights must end. The system for controlling intelligence must be brought back within the constitutional scheme.

Some of our proposals are stark and simple. Because certain domestic intelligence activities were clearly wrong, the obvious solution is to prohibit them altogether. Thus, we would ban tactics such as those used in the FBI's COINTELPRO. But other activities present more complex problems. We see a clear need to safeguard the constitutional rights of speech, assembly, and privacy. At the same time, we do not want to prohibit or unduly restrict necessary and proper intelligence activity.

In seeking to accommodate those sometimes conflicting interests we have been guided by the earlier efforts of those who originally shaped our nation as a republic under law.

The Constitutional amendments protecting speech and assembly and individual privacy seek to preserve values at the core of our heritage and vital to our future. The Bill of Rights, and the Supreme Court's decisions interpreting it suggest three principles which we have followed:

(1) Governmental action which directly infringes the rights of free speech and association must be prohibited. The First Amendment recognizes that even if useful to a proper end, certain governmental actions are simply too dangerous to permit at all. It commands that "Congress shall make *no* law" abridging freedom of speech or assembly.

(2) The Supreme Court, in interpreting that command, has required that any governmental action which has a collateral (rather than direct) impact upon the rights of speech and assembly is permissible only if it meets two tests. First, the action must be undertaken only to fulfill a compelling governmental need, and second, the government must use the least restrictive means to meet that need. The effect upon protected interests must be minimized.[2]

(3) Procedural safeguards—"auxiliary precautions" as they were characterized in the Federalist Papers [3]—must be adopted along with substantive restraints. For example, while the Fourth Amendment prohibits only "unreasonable" searches and seizures, it requires a procedural check for reasonableness—the obtaining of a judicial warrant upon probable cause from a neutral magistrate. Our proposed procedural checks range from judicial review of intelligence activity before or after the fact, to formal and high level Executive branch approval, to greater disclosure and more effective Congressional oversight.

The Committee believes that its recommendations should be embodied in a comprehensive legislative charter defining and controlling the domestic security activities of the Federal Government. Accordingly, Part i of the recommendations provides that intelligence agencies must be made subject to the rule of law. In addition, Part i makes clear that no theory, of "inherent constitutional authority" or otherwise, can justify the violation of any statute.

Starting from the conclusion, based upon our record, that the Constitution and our fundamental values require a substantial curtailment of the scope of domestic surveillance, we deal after Part i with five basic questions:

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[2] *De Gregory* v. *New Hampshire*, 383 U.S. 825, 829 (1966); *NAACP* v. *Alabama*, 377 U.S. 288 (1964); *Gibson* v. *Florida Legislative Investigation Commission*, 372 U.S. 539, 546 (1962); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

[3] Madison, Federalist No. 51. Madison made the point with grace:

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

1. Which agencies should conduct domestic security investigations?

The FBI should be primarily responsible for such investigations. Under the minimization principle, and to facilitate the control of domestic intelligence operations, only one agency should be involved in investigative activities which, even when limited as we propose, could give rise to abuse. Accordingly, Part ii of these recommendations reflects the Committee's position that foreign intelligence agencies (the CIA, NSA, and the military agencies) should be precluded from domestic security activity in the United States. Moreover, they should only become involved in matters involving the rights of Americans abroad where it is impractical to use the FBI, or where in the course of their lawful foreign intelligence operations [4] they inadvertently collect information relevant to domestic security investigations. In Part iii the Committee recommends that non-intelligence agencies such as the Internal Revenue Service and the Post Office be required, in the course of any incidental involvement in domestic security investigations, to protect the privacy which citizens expect of first class mail and tax records entrusted to those agencies.

2. When should an American be the subject of an investigation at all; and when can particularly intrusive covert techniques, such as electronic surveillance or informants, be used?

In Part iv, which deals with the FBI, the Committee's recommendations seek to prevent the excessively broad, ill-defined and open ended investigations shown to have been conducted over the past four decades. We attempt to change the focus of investigations from constitutionally protected advocacy and association to dangerous conduct. Part iv also sets forth specific substantive standards for, and procedural controls on, particular intrusive techniques.

3. Who should be accountable within the Executive branch for ensuring that intelligence agencies comply with the law and for the investigation of alleged abuses by employees of those agencies?

In Parts v and vi, the Committee recommends that these responsibilities fall initially upon the agency heads, their general counsel and inspectors general, but ultimately upon the Attorney General. The information necessary for control must be made available to those responsible for control, oversight and review; and their responsibilities must be made clear, formal, and fixed.

4. What is the appropriate role of the courts?

In Part vii, the Committee recommends the enactment of a comprehensive civil remedy providing the courts with jurisdiction to entertain legitimate complaints by citizens injured by unconstitutional or illegal activities of intelligence agencies. Part viii suggests that criminal penalties should attach in cases of gross abuse. In addition, Part iv provides for judicial warrants before certain intrusive techniques can be used.

5. What is the appropriate role of Congress:

In Part xii the Committee reiterates its position that the Senate create a permanent intelligence oversight committee.

The recommendations deal with numerous other issues such as the proposed repeal or amendment of the Smith Act, the proposed modernization of the Espionage Act to cover modern forms of espionage seriously detrimental to the national interest, the use of the GAO to assist Congressional oversight of the intelligence community, and remedial measures for past victims of improper intelligence activity.

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[4] Directed primarily at foreigners abroad.

Scope of Recommendations.—The scope of our recommendations coincides with the scope of our investigation. We examined the FBI, which has been responsible for most domestic security investigations, as well as foreign and military intelligence agencies, the IRS, and the Post Office, to the extent they became involved incidentally in domestic intelligence functions. While there are undoubtedly activities of other agencies which might legitimately be addressed in these recommendations, the Committee simply did not have the time or resources to conduct a broader investigation. Furthermore, the mandate of Senate Resolution 21 required that the Committee exclude from the coverage of its recommendations those activities of the federal government which are directed at organized crime and narcotics.

The Committee believes that American citizens should not lose their constitutional rights to be free from improper intrusion by their Government when they travel overseas. Accordingly, the Committee proposes recommendations which apply to protect the rights of Americans abroad as well as at home.

1. Activities Covered

The Domestic Intelligence Recommendations pertain to: the domestic security activities of the federal government;[5] and any activities of military or foreign intelligence agencies which affect the rights of Americans[6] and any intelligence activities of any non-intelligence agency working in concert with intelligence agencies, which affect those rights.

2. Activities Not Covered

The recommendations are not designed to control federal investigative activities directed at organized crime, narcotics, or other law enforcement investigations unrelated to domestic security activities.

3. Agencies Covered

The agencies whose activities are specifically covered by the recommendations are:

(i) the Federal Bureau of Investigation; (ii) the Central Intelligence Agency; (iii) the National Security Agency and other intelligence agencies of the Department of De-

[5] "Domestic security activities" means federal governmental activities, directed against Americans or conducted within the United States or its territories, including enforcement of the criminal law, intended to (a) protect the United States from hostile foreign intelligence activity, including espionage; (b) protect the federal, state, and local governments from domestic violence or rioting; and (c) protect Americans and their government from terrorist activity. See Part xiii of the recommendations and conclusions for all the definitions used in the recommendations.

[6] "Americans" means U.S. citizens, resident aliens and unincorporated associations, composed primarily of U.S. citizens or resident aliens; and corporations, incorporated or having their principal place of business in the United States or having majority ownership by U.S. citizens, or resident aliens, including foreign subsidiaries of such corporations, provided, however, Americans does not include corporations directed by foreign governments or organizations.

fense; (iv) the Internal Revenue Service; and (v) the United States Postal Service.

While it might be appropriate to provide similar detailed treatment to the activities of other agencies, such as the Secret Service, Customs Service, and Alcohol, Tobacco, and Firearms Division (Treasury Department), the Committee did not study these agencies intensively. A permanent oversight committee should investigate and study the intelligence functions of those agencies and the effect of their activities on the rights of Americans.

4. Indirect Prohibitions

Except as specifically provided herein, these Recommendations are intended to prohibit any agency from doing indirectly that which it would be prohibited from doing directly. Specifically, no agency covered by these Recommendations should request or induce any other agency, or any person, whether the agency or person is American or foreign, to engage in any activity which the requesting or inducing agency is prohibited from doing itself.

5. Individuals and Groups Not Covered

Except as specifically provided herein, these Recommendations do not apply to investigation of foreigners [7] who are officers or employees of a foreign power, or foreigners who, pursuant to the direction of a foreign power, are engaged in or about to engage in "hostile foreign intelligence activity" or "terrorist activity".[8]

6. Geographic Scope

These Recommendations apply to intelligence activities which affect the rights of Americans whether at home or abroad, including all domestic security activities within the United States.

7. Legislative Enactment of Recommendations

Most of these Recommendations are designed to be implemented in the form of legislation and others in the form of regulations pursuant to statute. (Recommendations 85 and 90 are not proposed to be implemented by statute.

C. Recommendations

Pursuant to the requirement of Senate Resolution 21, these recommendations set forth the new congressional legislation [the Committee] deems necessary to "safeguard the rights of American citizens." [9] We believe these recommendations are the appropriate conclusion to a traumatic year of disclosures of abuses. We hope they will prevent such abuses in the future.

i. Intelligence Agencies Are Subject to the Rule of Law

Establishing a legal framework for agencies engaged in domestic security investigation is the most fundamental reform needed to end the long history of violating and ignoring the law set forth in Finding A. The legal framework can be created by a two-stage process of enabling legislation and administrative regulations promulgated to implement the legislation.

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[7] "Foreigners" means persons and organizations who are not Americans as defined above.

[8] These terms, which cover the two areas in which the Committee recommends authorizing preventive intelligence investigations, are defined on pp. 340–341.

[9] S. Res. 21, Sec. 5; 2(12).

However, the Committee proposes that the Congress, in developing this mix of legislative and administrative charters, make clear to the Executive branch that it will not condone, and does not accept, any theory of inherent or implied authority to violate the Constitution, the proposed new charters, or any other statutes. We do not believe the Executive has, or should have, the inherent constitutional authority to violate the law or infringe the legal rights of Americans, whether it be a warrantless break-in into the home or office of an American, warrantless electronic surveillance, or a President's authorization to the FBI to create a massive domestic security program based upon secret oral directives. Certainly, there would be no such authority after Congress has, as we propose it should, covered the field by enactment of a comprehensive legislative charter.[10] Therefore statutes enacted pursuant to these recommendations should provide the exclusive legal authority for domestic security activities.

Recommendation 1.—There is no inherent constitutional authority for the President or any intelligence agency to violate the law.

Recommendation 2.—It is the intent of the Committee that statutes implementing these recommendations provide the exclusive legal authority for federal domestic security activities.

(*a*) No intelligence agency may engage in such activities unless authorized by statute, nor may it permit its employees, informants, or other covert human sources [11] to engage in such activities on its behalf.

(*b*) No executive directive or order may be issued which would conflict with such statutes.

Recommendation 3.—In authorizing intelligence agencies to engage in certain activities, it is not intended that such authority empower agencies, their informants, or covert human sources to violate any prohibition enacted pursuant to these Recomendations or contained in the Constitution or in any other law.

ii. United States Foreign and Military Agencies Should Be Precluded from Domestic Security Activities

Part iv of these Recommendations centralizes domestic security investigations within the FBI. Past abuses also make it necessary that the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency, and the military departments be precluded expressly, except as specifically provided herein, from investigative activity which is conducted within the United States. Their activities abroad should also be controlled as provided herein to minimize their impact on the rights of Americans.

a. Central Intelligence Agency

The CIA is responsible for foreign intelligence and counterintelligence. These recommendations minimize the impact of CIA operations on Americans. They do not affect CIA investigations of foreigners outside of the United States. The main thrust is to prohibit past actions revealed as excessive, and to transfer to the FBI other activities which might involve the CIA in internal security or law enforcedomestic communications, even for foreign intelligence purposes. Second, the Committee recommends that NSA should not select messages for monitoring, from those foreign communications it has intercepted, because the message is to or from or refers to a particular American, unless the Department of Justice has first obtained a search warrant, or the particular American has consented. Third, the Committee recommends that NSA be required to make every practicable effort to eliminate or minimize the extent to which the communications of Americans are intercepted, selected, or monitored. Fourth, for those communications of Americans which are nevertheless incidentally selected and monitored, the Committee recommends that NSA be prohibited from disseminating such communication, or information derived therefrom, which identifies an American, unless the communication indicates evidence of hostile foreign intelligence or terrorist activity, or felonious criminal conduct, or contains a threat of death or serious bodily harm. In these cases, the Committee recommends that the Attorney General approve any such dissemination as being consistent with these policies.

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[10] See, *e.g.*, *Youngstown Sheet and Tube Company* v. *Sawyer*, 343 U.S. 579 (1952).

[11] "Covert human sources" means undercover agents or informants who are paid or otherwise controlled by an agency.

In summary, the Committee's recommendations reflect its belief that NSA should have no greater latitude to monitor the communications of Americans than any other intelligence agency. To the extent that other agencies are required to obtain a warrant before monitoring the communications of Americans, NSA should be required to obtain a warrant.[34]

Recommendation 14.—NSA should not engage in domestic security activities. Its functions should be limited in a precisely drawn legislative charter to the collection of foreign intelligence from foreign communications.[35]

Recommendation 15.—NSA should take all practicable measures consistent with its foreign intelligence mission to eliminate or minimize the interception, selection, and monitoring of communications of Americans from the foreign communications.[36]

Recommendation 16.—NSA should not be permitted to select for monitoring any communication to, from, or about an American without his consent, except for the purpose of obtaining information about hostile foreign intelligence or terrorist activities, and then only if a warrant approving such monitoring is obtained in accordance with procedures similar[37] to those contained in Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

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[34] None of the Committee's recommendations pertaining to NSA should be construed as inhibiting or preventing NSA from protecting U.S. communications against interception or monitoring by foreign intelligence services.

[35] "Foreign communications," as used in this section, refers to a communication between or among two or more parties in which at least one party is outside the United States, or a communication transmitted between points within the United States only if transmitted over a facility which is under the control of, or exclusively used by, a foreign government.

[36] In order to ensure that this recommendation is implemented, both the Attorney General and the appropriate oversight committees of the Congress should be continuously apprised of, and periodically review, the measures taken by NSA pursuant to this recommendation.

[37] The Committee believes that in the case of interceptions authorized to obtain information about hostile foreign intelligence, there should be a presumption that notice to the subject of such intercepts, which would ordinarily be required under Title III (18 U.S.C. 2518(8)(d)), is not required, unless there is evidence of gross abuse.

vi. Administrative Rulemaking and Increased Disclosure Should Be Required

a. Administrative Rulemaking

Recommendation 86.—The Attorney General should approve all administrative regulations required to implement statutes created pursuant to these recommendations.

Recommendation 87.—Such regulations, except for regulations concerning investigations of hostile foreign intelligence activity or other matters which are properly classified, should be issued pursuant to the Administrative Procedures Act and should be subject to the approval of the Attorney General.

Recommendation 88.—The effective date of regulations pertaining to the following matters should be delayed ninety days, during which time Congress would have the opportunity to review such regulations:[65]

(*a*) Any CIA activities against Americans, as permitted in ii.a. above;

(*b*) Military activities at the time of a civil disorder;

(*c*) The authorized scope of domestic security investigations, authorized investigative techniques, maintenance and dissemination of information by the FBI; and

(*d*) The termination of investigations and covert techniques as described in Part iv.

b. Disclosure

Recommendation 89.—Each year the FBI and other intelligence agencies affected by these recommendations should be required to seek annual statutory authorization for their programs.

Recommendation 90.—The Freedom of Information Act (5 U.S.C. 552(b)) and the Federal Privacy Act (5 U.S.C. 552(a)) provide important mechanisms by which individuals can gain access to information on intelligence activity directed against them. The Domestic Intelligence Recommendations assume that these statutes will continue to be vigorously enforced. In addition, the Department of Justice should notify all readily identifiable targets of past illegal surveillance techniques, and all COINTELPRO victims, and third parties who had received anonymous COINTELPRO communications, of the nature of the activities directed against them, or the source of the anonymous communication to them.[65a]

vii. Civil Remedies Should Be Expanded

Recommendation 91 expresses the Committee's concern for establishing a legislative scheme which will afford effective redress to people who are injured by improper federal intelligence activity. The recommended provisions for civil remedies are also intended to deter improper intelligence activity without restricting the sound exercise of discretion by intelligence officers at headquarters or in the field.

As the Committee's investigation has shown, many Americans have suffered injuries from domestic intelligence activity, ranging from deprivation of constitutional rights of privacy and free speech to the loss of a job or professional standing, break-up of a marriage, and impairment of physical or mental health. But the extent, if any, to

[65] This review procedure would be similar to the procedure followed with respect to the promulgation of the Federal Rules of Criminal and Civil Procedure.

[65a] It is not proposed that this recommendation be enacted as a statute.

which an injured citizen can seek relief—either monetary or injunctive—from the government or from an individual intelligence officer is far from clear under the present state of the law.

One major disparity in the current state of the law is that, under the Reconstruction era Civil Rights Act of 1871, the deprivation of constitutional rights by an officer or agent of a state government provides the basis for a suit to redress the injury incurred; [66] but there is no statute which extends the same remedies for identical injuries when they are caused by a federal officer.

In the landmark *Bivens* case, the Supreme Court held that a federal officer could be sued for money damages for violating a citizen's Fourth Amendment rights.[67] Whether monetary damages can be obtained for violation of other constitutional rights by federal officers remains unclear.

While we believe that any citizen with a substantial and specific claim to injury from intelligence activity should have standing to sue, the Committee is aware of the need for judicial protection against legal claims which amount to harassment or distraction of government officials, disruption of legitimate investigations, and wasteful expenditure of government resources. We also seek to ensure that the creation of a civil remedy for aggrieved persons does not impinge upon the proper exercise of discretion by federal officials.

Therefore, we recommend that where a government official—as opposed to the government itself—acted in good faith and with the reasonable belief that his conduct was lawful, he should have an affirmative defense to a suit for damages brought under the proposed statute. To tighten the system of accountability and control of domestic intelligence activity, the Committee proposes that this defense be structured to encourage intelligence officers to obtain written authorization for questionable activities and to seek legal advice about them.[68]

To avoid penalizing federal officers and agents for the exercise of discretion, the Committee believes that the government should indemnify their attorney fees and reasonable litigation costs when they are held not to be liable. To avoid burdening the taxpayers for the deliberate misconduct of intelligence officers and agents, we believe the government should be able to seek reimbursement from those who willfully and knowingly violate statutory charters or the Constitution.

Furthermore, we believe that the courts will be able to fashion discovery procedures, including inspection of material in chambers, and to issue orders as the interests of justice require, to allow plaintiffs with substantial claims to uncover enough factual material to argue their case, while protecting the secrecy of governmental information in which there is a legitimate security interest.

The Committee recommends that a legislative scheme of civil remedies for the victims of intelligence activity be established along the

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[66] 42 U.S.C. 1983.

[67] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

[68] One means of structuring such a defense would be to create a rebuttable presumption that an individual defendant acted so as to avail himself of this defense when he proves that he acted in good faith reliance upon: (1) a written order or directive by a government officer empowered to authorize him to take action; or (2) a written assurance by an appropriate legal officer that his action is lawful.

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following lines to clarify the state of the law, to encourage the responsible execution of duties created by the statutes recommended herein to regulate intelligence agencies, and to provide relief for the victims of illegal intelligence activity.

Recommendation 91.—Congress should enact a comprehensive civil remedies statute which would accomplish the following:[69]

(a) Any American with a substantial and specific claim[70] to an actual or threatened injury by a violation of the Constitution by federal intelligence officers or agents[71] acting under color of law should have a federal cause of action against the government and the individual federal intelligence officer or agent responsible for the violation, without regard to the monetary amount in controversy. If actual injury is proven in court, the Committee believes that the injured person should be entitled to equitable relief, actual, general, and punitive damages, and recovery of the costs of litigation.[72] If threatened injury is proven in court, the Committee believes that equitable relief and recovery of the costs of litigation should be available.

(*b*) Any American with a substantial and specific claim to actual or threatened injury by violation of the statutory charter for intelligence activity (as proposed by these Domestic Intelligence Recommendations) should have a cause of action for relief as in (a) above.

(*c*) Because of the secrecy that surrounds intelligence programs, the Committee believes that a plaintiff should have two years from the date upon which he discovers, or reasonably should have discovered, the facts which give rise to a cause of action for relief from a constitutional or statutory violation.

(*d*) Whatever statutory provision may be made to permit an individual defendant to raise an affirmative defense that he acted within the scope of his official duties, in good faith, and with a reasonable belief that the action he took was lawful, the Committee believes that to ensure relief to persons injured by governmental intelligence activity, this defense should be available solely to individual defendants and should not extend to the government. Moreover, the defense should not be available to bar injunctions against individual defendants.

viii. Criminal Penalties Should Be Enacted

Recommendation 92.—The Committee believes that criminal penalties should apply, where appropriate, to willful and knowing

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[69] Due to the scope of the Committee's mandate, we have taken evidence only on constitutional violations by intelligence officers and agents. However, the anomalies and lack of clarity in the present state of the law (as discussed above) and the breadth of constitutional violations revealed by our record, suggest to us that a general civil remedy would be appropriate. Thus, we urge consideration of a statutory civil remedy for constitutional violations by any federal officer; and we encourage the appropriate committees of the Congress to take testimony on this subject.

[70] The requirement of a substantial and specific claim is intended to allow a judge to screen out frivolous claims where a plaintiff cannot allege specific facts which indicate that he was the target of illegal intelligence activity.

[71] "Federal intelligence officers or agents" should include a person who was an intelligence officer, employee, or agent at the time a cause of action arose. "Agent" should include anyone acting with actual, implied, or apparent authority.

[72] The right to recover "costs of litigation" is intended to include recovery of reasonable attorney fees as well as other litigation costs reasonably incurred.